

# Notes and Comments

## Nonconsensual Liens Under Article 9

The Uniform Commercial Code<sup>1</sup> does not spring forth from the statute books a self-contained, self-sufficient body of law. The ways in which the Code can affect or be affected by state law outside its scope are often as important as they are subtle. Article 9 of the Code includes as security interests only liens created by voluntary agreement.<sup>2</sup> Non-consensual liens are excluded expressly or by implication.<sup>3</sup> Creditors with such nonconsensual liens must inevitably come into conflict with the world of Article 9 interests. To an extent the Code attempts to provide for such conflicts, but its response is neither complete nor totally clear.<sup>4</sup>

### Nonconsensual Liens Under Section 9-310

States commonly grant by statute or common law a lien to artisans to assure collection of debts owed them. For such liens the Code provides in Section 9-310 that:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

1. UNIFORM COMMERCIAL CODE (1962 Official Text) [hereinafter cited as U.C.C.].

2. U.C.C. § 9-102(2):

This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310.

3. U.C.C. § 9-104:

This Article does not apply . . . (b) to a landlord's lien; or (c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 on priority of such liens; or . . . (h) to a right represented by a judgment.

U.C.C. § 9-102, Comment 1:

. . . Section 9-104 excludes certain transactions where the security interest (such as an artisan's lien) arises under statute or common law by reason of status and not by consent of the parties.

4. It is not intended that all the varied types of common law liens which may conflict with Article 9 interests be mentioned here. Furthermore state and federal tax law or the federal law of bankruptcy may also affect the priority rights of Article 9 interests. Such laws, however, will not be examined directly. The state law cited or contrasted with that of other states serves only to illustrate the type of problem that may be encountered in applying the Code. The law in each state will obviously raise its own special problems.

This deceptively neat provision is a mosaic of rather complex obscurities.

*"A lien . . . given by statute or rule of law for such materials or services"*

When a debtor subjected encumbered property to an artisan's lien, pre-Code law often made priority between the artisan and secured creditor turn on whether the secured party or the debtor had title.<sup>5</sup> In this circumstance the Code intended to render location of title irrelevant and to grant the artisan priority unless state statutes expressly subordinated his interest.<sup>6</sup> Section 9-310 clearly effectuates this priority scheme. But solution of the *priority* problem may not assure success for the artisan. Under pre-Code law in some states, the secured creditor took precedence over the artisan not because the artisan lacked "priority," but because the artisan had no lien. The reasoning was that when a creditor held title, his debtor could not subject goods to an artisan's lien.<sup>7</sup> While Section 9-310 gives priority to an artisan's lien "given by statute or rule of law," what, if any, is its effect on prior state law regarding the existence or nonexistence of such a lien?

Under Section 9-202 "each provision of . . . Article [9] with regard to rights, obligations and remedies" is to apply "whether title to collateral

5. This is the description of pre-Code law given in U.C.C. § 9-310, Comment 2. *Mb. CODE ANN.* art. 21, § 54 (repealed 1963). *Goldenberg v. Federal Fin. & Credit Co.*, 150 Md. 298, 302, 133 A. 59, 61 (1926):

. . . the same statute which gives the lien subordinates it to the rights of persons holding the title to it under a conditional sales contract . . . (p. 150)

In *General Motors Acceptance Corp. v. Allen*, 52 Ill. App. 2d 114, 201 N.E.2d 747 (1964), the existence of an artisan's lien was recognized, but the opinion holds that "the lien of the conditional vendor (titleholder) . . . is superior to that of the garage owner." *Id.* at 117. Adoption of the U.C.C. was held to have overruled this priority scheme. *Westlake Fin. Co. v. Spearmon*, 64 Ill. App. 2d 342, 213 N.E.2d 80, (1965); *Westlake Fin. Co. v. Alex C. Montgomery*, 64 Ill. App. 2d 347, 213 N.E.2d 34 (1965). *Cf. Terrell v. Loomis*, 218 Ark. 296, 301, 235 S.W.2d 961, 963 (1951).

6. U.C.C. § 9-310, Comment 2:

. . . Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have "title." This Section changes such rules and makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the licnor's business and the goods involved are in the lienor's possession.

7. *New Britain Real Estate & Title Co. v. Collington*, 102 Conn. 652, 129 A. 780 (1925), citing 1 L. JONES, *LAW OF LIENS* § 733 (1894), "[t]o entitle one to a lien for work done upon a chattel the work must be done at the owner's request," 102 Conn. at 655-56, 129 A. at 781. *But see United States v. United Aircraft Corp.*, 80 F. Supp. 52 (D. Conn. 1948); *see also Bankers' Commercial Sec. Co. v. Brennan & Levy*, 75 Pa. Super. 199 (1920) (bailment lessor, title in bailor): "[the bailee] certainly could not have sold the truck so as to pass the owner's title, and as a general rule there is no good reason why a party not the owner of property should be permitted to create a lien upon it any more than he should be permitted to sell it." *Id.* at 203. *See also Midland Discount Co. v. Perry*, 2 Cumb. 65 (Cumberland, Pa., County Ct. 1951); *Guaranty Sec. Corp. v. Brophy*, 243 Mass. 597, 137 N.E. 751 (1923); *Rehm v. Viall*, 185 Ill. App. 425 (1914); *Bath Motor Mart v. Miller*, 122 Me. 29, 118 A. 715 (1922).

is in the secured party or in the debtor." If controlling, this rule would leave an artisan's rights unaffected by the location of title. But Section 9-202 governs only interests created by the Code itself; it is not determinative "in cases where the applicability of some other rule of law depends upon who has title."<sup>8</sup> Since the creation of an artisan's lien is subject to rules of law outside the Code, Section 9-202 cannot salvage Section 9-310 priority for an artisan who is deemed by state law to have no lien.

Since the title holder generally has sole dominion over his property,<sup>9</sup> it may be theoretically consistent to hold that a debtor who has conveyed or left title with a creditor cannot subject the property to an artisan's encumbrance. But the Code has never made the mystique of title and legal dominion the touchstone of substantive rights.<sup>10</sup> Section 9-310 is designed to give an artisan a prior lien to secure claims arising from work which enhances or preserves the value of collateral.<sup>11</sup> Because the secured creditor as well as the debtor benefits from such work, the artisan should be compensated before either asserts his claim to the collateral.<sup>12</sup> This justification for the artisan's priority exists whether the creditor's interest in the collateral is labeled a lien or title. It would be the height of technical legalism to assert the contrary.

Courts might avoid such legalism by reading the limitation in Section 9-310 to require only that the "services or materials" provided be the

8. U.C.C. § 9-202, Comment. *In re Yale Express Sys. Inc.*, 250 F. Supp. 249 (S.D.N.Y. 1966). (Fruehauf Corporation perfected a security interest in equipment originally extended to Yale Express on simple credit. Two months after perfection of the security agreement Yale filed a petition for reorganization under Chapter 10 of the Federal Bankruptcy Act. Fruehauf petitioned for repossession of the equipment, claiming that the terms of the security agreement gave it the right to repossess under the circumstances. The district court assumed that the petition to repossess could be granted under federal law only if the equipment was not "property of the debtor." In holding that the equipment was the property of the debtor the court rejected the creditor's argument that Section 9-202 applied to the problem at hand. The provision was held merely to give "[t]he holder of a valid security interest all of the rights, obligations and remedies which are provided by the Code itself." *Id.* at 253 (emphasis in original). The court also found that state law distinguishing between chattel mortgages and conditional sales on the basis of who retains title was still relevant in the context of this case and concluded that since the parties intended only to create a chattel mortgage, title had passed under the agreement to Yale and the equipment was no longer the property of Fruehauf.

9. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 5 (2d ed. 1955); *Estey Co. v. Dick*, 41 Pa. Super. 610 (1910).

10. U.C.C. § 1-102(1): "This Act shall be liberally construed and applied to promote its underlying purposes and policies"; *Id.* § 9-202:

Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

11. U.C.C. § 9-310, Comment.

12. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 33.3, at 878 (1965): "No doubt the underlying policy justification is the thought that the lienor, through the services or materials which he has furnished, has increased the value of the property; it would be giving the holder of the security interest an unjustifiable windfall to allow him to claim the property, thus improved, while the serviceman remains unpaid."

type for which state law gives a lien. The limitation need not be read to also incorporate state law which requires that the debtor have title in order for a lien to arise. Courts have already demonstrated a willingness in analogous contexts to ignore formalistic distinctions as to the location of title. In *Commonwealth v. Two Ford Trucks*,<sup>13</sup> private encumbrances were given priority over a state lien on trucks for highway violations. A creditor, who held a bailment lease<sup>14</sup> and was thus a security title holder, was allowed to qualify as an encumbrancer for purposes of the priority statute. Citing Article 9 for partial support, the court declared that "[e]very bailment-lessor . . . is an owner for certain purposes and an encumbrancer for certain other purposes."<sup>15</sup> No logical difficulty would prevent a court from accepting the same argument and coming down with a similar result when prior state law permits an artisan's lien only where the secured creditor is an encumbrancer and not the title-holder.<sup>16</sup>

Even where location-of-title concepts are adhered to, courts have validated the artisan's lien by legal fiction. For example, repairs to a car made at the request of a conditional vendee enhance the value of the car and inure to the benefit of the title-holder. Some courts therefore conclude that "the conditional vendor of an automobile, when he places it in the possession of a conditional vendee for use, impliedly consents to the bailment of the car for reasonable repairs which enhance its value."<sup>17</sup> In addition to the fiction of implied consent, courts have used notions of estoppel to secure the rights of an artisan to a lien after a conditional sale when the vendor failed to file proper notice of his interest. In such cases, with respect to the artisan the buyer is held to

13. 185 Pa. Super. 292, 137 A.2d 847 (1958).

14. The bailment lease was a major pre-Code security interest in Pennsylvania. Most such interests would now qualify under Section 1-201 as an Article 9 interest. According to Pennsylvania law an artisan could subject goods to a lien for work done when the owner of the goods had requested that such work be performed, or when the owner's consent could be reasonably implied from the circumstances. Because one holding goods under a bailment lease did not possess title to the goods, he could not under state law subject the goods to an artisan's lien. *Schmidt v. Bader*, 284 Pa. 41, 130 A. 259 (1925); *Blair v. Adamchick*, 145 Pa. Super. 125, 21 A.2d 107 (1941).

15. *Commonwealth v. Two Ford Trucks*, 185 Pa. Super. 292, 301, 137 A.2d 847, 852 (1958).

16. The court would be undertaking the more difficult task of reversing prior state law, however, and might therefore be more reluctant to follow the path suggested. In *Two Ford Trucks* it merely refused to apply established title doctrines to a newly-arisen legal question.

17. *New Britain Real Estate & Title Co. v. Collington*, 102 Conn. 652, 656, 129 A. 780, 781 (1925). See also *Hammond v. Danielson*, 126 Mass. 294 (1879); *DeVan Motor Co. v. Bailey*, 177 Miss. 441, 171 So. 342 (1936). *Contra*, *Goldstein v. Mack Motor Truck Co.*, 56 R.I. 1, 183 A. 136 (1936); *Lee, Power of Possessor of Personal Property to Create Lien for Repairs and Storage Charges Superior to Existing Interests of Others*, 90 U. PA. L. REV. 910, 924 (1942).

have absolute title, so that the buyer can subject his property to the artisan's lien. As against the buyer, title remains in the seller.<sup>18</sup>

Two conclusions are thus apparent. First, case law recognizes the wisdom of allowing the artisan his lien, regardless of whether the creditor or debtor had title to the property serviced. Second, the Code itself envisions this result, but does not expressly incorporate it. In a jurisdiction which adopts the Code, a court should reconsider any position it has taken to the contrary. For as Comment 1 to Section 1-102 clearly states, courts "have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act . . . . They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general."<sup>19</sup>

In addition, rejection of prior state law making a lien dependent on title would further uniformity within and among states which let location of title turn on the mere form in which a security transaction is cast.<sup>20</sup> It would eliminate the possibility that parties to the original security agreement could arrange their transaction so as to destroy the rights of third-party artisans.<sup>21</sup> Finally, it would avoid the arbitrary results that inevitably follow substantial reliance on such legal fictions as implied consent.<sup>22</sup>

18. *General Motors Acceptance Corp. v. Cirone*, 146 Conn. 64, 147 A.2d 481 (1958). In Pennsylvania the inability of the bailment-lessee to commit the goods to service liens is also limited by the requirement that for the lessor to retain title he or his assignor must originally have had actual possession of the goods. *Atlantic Fin. Corp. v. Kester*, 156 Pa. Super. 128, 39 A.2d 740 (1944).

19. U.C.C. § 1-102, Comment 1.

20. In Pennsylvania a secured creditor retained title if he cast his security agreement in the form of a bailment lease, but not if he cast it as a chattel mortgage or conditional sale. The ability of the debtor to subject his property to an artisan's lien thus varied with the form rather than the substance of the security transaction. See *Duplex Printing Press Co. v. Clipper Pub. Co.*, 213 Pa. 207, 62 A. 841 (1906); *Schmidt v. Bader*, 284 Pa. 41, 130 A. 259 (1925); Law of May 12, 1925, Pa. P.L. 603, No. 325, [1915] (repealed 1953); Law of June 1, 1945, Pa. P.L. 1043, §§ 1-17, [1945] (repealed 1953).

The debtor's ability to subject his property to an artisan's lien varied from state to state as well as within a state. In Connecticut, for example, title remained with the creditor in all cases, whereas in Pennsylvania it always passed to the debtor (except in a bailment transaction). CONN. GEN. STAT. ANN. tit. 49, § 95 [1960] (repealed 1961); CONN. GEN. STAT. ANN. tit. 42, § 77 [1960] (repealed 1961); *Baker v. Brown & Thomas Auto Co.*, 101 Conn. 575, 126 A. 703 (1924) (agreement of sale); *New Britain Real Estate & Title Co. v. Collington*, 102 Conn. 652, 129 A. 780 (1952) (conditional sale); *Guilford-Chester Water Co. v. Guilford*, 107 Conn. 519, 141 A. 880 (1928) (chattel mortgage).

21. The parties to the original agreement could secure such a result by selecting a type of security agreement by which the creditor would for this purpose be held to have retained title. The parties could also expressly stipulate that the creditor is not to be viewed as giving his implied consent to the creation of artisan's liens for services or materials performed on the goods. The agreement could also state that the goods are to be kept free of all liens. See *Goldenberg v. Federal Fin. & Credit Co.*, 50 Md. 298, 133 A. 59 (1926).

22. Compare *Funchess v. Pennington*, 205 Miss. 500, 39 So. 2d 1 (1949) with *Wingate v.*

*"When a person in the ordinary course of his business furnishes services or materials with respect to goods"*

By narrowing its application to services on materials furnished *in the ordinary course of business*, the Code has exposed Section 9-310 to a potential avalanche of evidentiary trivia. If this language is taken literally, a serviceman or materialman would have to prove that the transaction giving rise to his lien was similar in nature and scope to his ordinary transactions before he could receive priority. Clearly, however, the Code did not intend courts to establish boundaries for the business of every lienor that comes before them. As long as a lienor performs services or furnishes materials which enhance the value of goods, he should be granted priority if there is some minimal similarity between his general business and the specific transaction for which he claims a lien. This would focus attention on whether the lienor has added services or materials to goods: the fact which justifies his priority. Presumably where the artisan grossly overcharges for the work he claims to have done, the overcharge does not relate to an enhancement of the goods' value. It would accordingly not be in the ordinary course of business.<sup>23</sup>

Determining exactly what constitutes "services or materials" may also raise difficulties. Some commentators argue that a landlord provides services by making available a place to preserve a tenant's goods and that a lien attaching to such goods therefore comes within Section 9-310.<sup>24</sup> Section 9-104, however, declares that Article 9 generally does not apply "... (b) to a landlord's lien; or (c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 on priority of such liens . . . ." The Article thus appears to differentiate a landlord's lien from a lien for services or materials, and gives priority only to the latter.

The Comment to Section 9-104(b) suggests that the drafters excluded landlord liens from Article 9 only to make explicit the Code's intent

Mississippi Securities, 152 Miss. 852, 120 So. 175 (1929); DeVan Motor Co. v. Bailey, 177 Miss. 441, 171 So. 342 (1936).

23. In discussing this phrase Gilmore suggests that the "limitation should be read as tantamount to a requirement of good faith." 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 33.5, at 888 (1965). Viewed in this light the phrase is simply a requirement that the amount of the repairs and the price charged be reasonable under all the circumstances. This interpretation would avoid the difficulty of determining the exact nature of the artisan's usual business. One difficulty with this reading is the Code's definition of a "[b]uyer in ordinary course of business" as "a person who buys in ordinary course from a person in the business of selling goods of that kind . . . ." U.C.C. § 1-201(9) (emphasis added). This suggests that "in the ordinary course of business" is a term denoting normal repeated business operations.

24. Pa. Bar Ass'n Note 5, PA. STAT. ANN. tit. 12A, § 9-310 (1954); Schwartz, *Pennsylvania's Chattel Security and the Uniform Commercial Code*, 98 U. PA. L. REV. 530, 541 (1950).

not to regulate interests in real property.<sup>25</sup> To the extent that a landlord's lien falls upon a tenant's crops, mineral ore or other real property, exclusion of the lien is consistent with this intention. But when a landlord's lien falls upon personal property, such as a tenant's automobile, exclusion of the lien from Article 9 would not be so justified.

Even if Section 9-104(b) did not exclude a landlord's lien on personal property from Article 9, such a lien may still be outside Section 9-310 because it is not for "services or materials furnished *with respect to goods*."<sup>26</sup> The court in *In re Einhorn Brothers*,<sup>27</sup> for example, refused to grant a landlord's lien priority under Section 9-310, on the grounds that the act of leasing was not "work that enhances or preserves the value of the collateral" and so not within the intended scope of the section.<sup>28</sup> This conclusion may have been based on a captious distinction between benefit to the tenant and benefit to the collateral goods. Since a lease may provide the tenant with both a place to work and a place to manufacture, store or merchandise his goods, such a distinction would compel a court either to wander aimlessly trying to apportion benefits or to decide arbitrarily whether it was the seized goods that primarily benefited from a lease.

If Section 9-310 is interpreted to exclude landlord, innkeeper and other such liens, the interpretation has ambiguous implications. Section 9-310 may intend by the exclusion to subordinate all landlord liens, or such liens may simply be outside its scope and subject to pre-existing state law. *In re Einhorn Brothers* rejected the argument that exclusion had the effect of subordinating landlord liens to Article 9 interests, and held instead that relevant law "was undisturbed by enactment of the Code."<sup>29</sup> This is reasonable, for were Section 9-310 intended to subordinate all liens not given priority it is unlikely that such a potentially wholesale change in state law would have been left to inference alone.

25. U.C.C. § 9-104, Comment 2: "Except for fixtures (Section 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by paragraph (b) and of leases and other interests in or liens on real estate by paragraph (i) merely reiterates the limitations on coverage already made explicit in Section 9-102(3)."

26. Emphasis added.

27. 171 F. Supp. 655 (E.D. Pa.), *aff'd*, 272 F.2d 434 (3d Cir. 1959); *see also* Firestone Tire & Rubber Co. v. Dutton, 205 Pa. Super. 4, 205 A.2d 656 (1965) (residential lease; *Einhorn* followed without discussion).

28. 171 F. Supp. at 660.

29. *Id.* The fact that former state law applies rather than Section 9-310 is of little practical significance in Pennsylvania since under state law the landlord generally is given priority over prior secured liens. PA. STAT. ANN. tit. 68, § 322 (1965). The right of a landlord to priority is not changed by the landlord's knowledge that the goods are not owned by the tenant or by the removal of the goods without the consent of the seller. Firestone Tire & Rubber Co. v. Dutton, 205 Pa. Super. 4, 205 A.2d 656 (1964) (dictum).

*"A lien upon goods in the possession of [the lienor]"*

The requirement that a lien be possessory before it is accorded priority first appeared without explanation in the Code's 1956 draft.<sup>30</sup> One possible reason for the addition was the 1952 amendment to Section 67(c) of the Bankruptcy Act.<sup>31</sup> The amendment invalidated as against the bankruptcy trustee nonpossessory statutory liens on personalty. Such liens could, for the benefit of unsecured creditors, be transferred to the bankruptcy trustee who was then entitled to any priority attaching to the lien.<sup>32</sup> Thus, in 1956, preference to an artisan's nonpossessory lien under Section 9-310 might have sacrificed the secured creditor's interest not to the artisan whom Section 9-310 seeks to protect but to unsecured creditors in bankruptcy. If a desire to avoid such a sacrifice motivated the drafters of section 9-310, however, the requirement no longer makes good sense. The Bankruptcy Act as of 1966 validates nonpossessory liens except where they are unenforceable against a bona fide purchaser or where they are effective only when the debtor is financially distressed.<sup>33</sup>

Possession by the artisan may still serve a useful purpose: it can put secured creditors on notice as to the artisan's interest.<sup>34</sup> Actual possession, however, is not always necessary to fulfill this notice function. The filing required under some artisan's lien statutes, for instance, may well give as much notice as continued possession; a court might well accept an adequate filing system as constituting constructive possession.<sup>35</sup>

30. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 33.5, at n.4 (1965).

31. Law of July 7, 1952, ch. 579, § 21(d), 66 Stat. 427 (repealed 1966).

32. 11 U.S.C.A. § 107(c)(2) (Supp. 1966): "The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee."

33. See 11 U.S.C.A. § 107(c) (Supp. 1966):

(1) The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists . . . .

The Act includes a secured creditor as a bona fide purchaser, 11 U.S.C. § 1(5) (1964).

34. Possession by an artisan may put third parties on notice as to the artisan's liens and preclude them from successfully claiming as bona fide purchasers under the Bankruptcy Act. F. Kennedy, *The Bankruptcy Amendments of 1966*, 1 GA. L. REV. 149, 156-57 (1967). The Act thus shifts emphasis from possession *per se*, to possession as a consideration effecting notice.

As to possession as a means of notice, see also *Goggin v. California Div. of Labor Law Enforcement*, 336 U.S. 118, 127-29 (1949); *City of New York v. Hall*, 139 F.2d 935, 936 (2d Cir. 1944); *Pond v. Skidmore*, 40 Conn. 210, 222 (1873). The liens in question were attachment liens. See also Note, *Statutory Liens Under Section 67(c) of the Bankruptcy Act*, 62 YALE L.J. 1131 (1953).

35. In this way the debtor would have the use of goods which could be essential to his ability to earn sufficient funds to pay off his creditors.



## Nonconsensual Liens

Filing may even furnish more effective notice than possession. Landlord liens, for example, are created when the landlord enters the premises, distrains the goods by viewing them, and notifies all known owners. The goods remain on the leased premises and are still subject to the tenant's use. Only their destruction or removal is prohibited.<sup>36</sup> For the unknown creditor, such "distrain" or possession provides no notice whatsoever.

But filing may also be less effective than possession. Some statutes permit an artisan to surrender possession while not requiring immediate filing;<sup>37</sup> notice will date from the time of surrender though filing may be delayed for months.<sup>38</sup> Such defects are not inherent in a system

36. *Mountcastle v. Schumann*, 205 Pa. Super. 21, 205 A.2d 642 (1964); PA. STAT. ANN. tit. 68, § 250.302 (1965) ("Notice in writing of such distress . . . shall be given . . . to the tenant and any other owner known to the landlord, personally, or by mailing the same . . . or by posting the same conspicuously on the premises charged with the rent"). Before the goods are sold at auction, public notice need only be given by means of handbills issued at least six days before the sale. *Id.* at § 250.309. A secured creditor could therefore never learn of the lien in time to prevent such an auction.

The prior secured creditor in Pennsylvania is not completely at the mercy of landlord liens, however. The law makes an exception to the general rule that a landlord is entitled to preference in the case of a tenant who holds certain specifically enumerated items under a conditional sale or bailment lease arrangement. These items include industrial mining and construction machinery and equipment not attached to the realty. *See id.* at §§ 250.401, 250.402, 250.404. In such an event the vendor or lessor may preserve his priority if he gives notice to the landlord of his security interest within ten days after the goods are placed on the landlord's premises or if he places his name in a prominent place on the goods. Case law has held that similar rights do not extend to one holding a chattel mortgage interest in the same goods. *Commercial Credit Plan v. Mahoney*, 67 Pa. D. & C. 577 (1948); *Herman v. Osgood*, 103 P.L.J. 231 (1956). To reach this holding the leading case relies in part on the conclusion that since the Chattel Mortgage Act "is a departure from the heretofore settled public policy of the State we cannot extend its provisions farther than was clearly intended by our legislature." 67 Pa. D. & C. at 579.

This pre-Code holding would seem a questionable one now in view of the Code's full acceptance of the chattel mortgage and its general policy of treating all security interests alike. Nevertheless, the statutory distinction may remain part of the Pennsylvania priority law.

The juxtaposition of the U.C.C. to statutes as this raises possible procedural problems as well. It is not certain whether the notice requirement imposed upon the secured creditor by the landlord statute is satisfied by simply meeting the notice requirements established by the Code for the protection of any security interest. Two different notice procedures may have to be followed because 1) the statute subordinating the landlord's lien in such circumstances seems to contemplate actual notice, while filing under Article 9 may only give constructive notice, and 2) the statute seems to require information in the notice that need not necessarily be included in the financing statement under the Code.

37. Immediate filing is not compelled because it is expected that the artisan will ordinarily collect for his work without asserting a lien. Filing, in these cases, would simply needlessly clog the record system. Such delayed filing does not, and was probably never intended to, provide fair and adequate notice. Filing, when it does occur, is designed primarily to evidence the artisan's claim, and to put pressure on the debtor to pay.

38. KY. REV. STAT. ch. 376.440(1) (1963). Statutes providing for filing in place of continued possession may raise further problems for secured creditors if the location for filing prescribed by the law is not easily ascertainable. The Kentucky statute largely obviates this problem by specifying that the artisan shall file in the county of the debtor's residence. *Id.* at chs. 376.440(1), 376.445. However, the county of residence of a statewide company may not always be clear. Furthermore, if the debtor is not a resident of the state the

substituting filing for actual possession, however. They could be avoided if the state adopted a scheme analogous to that used by the Code for purchase money security interests in inventories.<sup>39</sup> Notice would then automatically be sent to prior encumbrancers and the lien would be recorded, so subsequent creditors would have as much notice as they have of any other lien.<sup>40</sup>

The most difficult liens to reconcile with the possessory wording in Section 9-310 are those in which the lienholder has never had actual possession of the goods. While states may allow for artisan's liens under such circumstances,<sup>41</sup> the mechanic's lien<sup>42</sup> is more typical of this type.

Though not generally classed as interests in personal property, mechanic's liens still compete with Article 9 security interests. Fixtures remain subject to an Article 9 interest unless the goods become "incorporated into a structure in the manner of lumber, bricks . . . and the like."<sup>43</sup> Even structural affixations like brickwork may remain subject to

artisan must file in the county where the goods are located. Secured creditors may not know the location of the goods at the time the artisan filed.

Originally the potential threat to the interests of secured creditors was limited by a provision that established a first in time, first in right priority scheme. *Id.* at ch. 376.450. However, if Section 9-310 were held controlling, the exception for contrary state law would not operate to incorporate the former state priority statute. Case law has held that because the statute refers to mortgages while the Code recognizes "security interests" only, the statute is no longer applicable. *Corbin Deposit Bank v. King*, 384 S.W.2d 302 (Ky. Ct. App. 1964).

39. U.C.C. § 9-107:

A security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price;

or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

*Id.* at § 9-312(3):

(3) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if . . .

(a) at the time the debtor receives possession;

(b) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items or type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest.

40. Of course, no system can feasibly furnish notice to unknown creditors.

41. E.g., KY. REV. STAT. ch. 376.440(2) (1963) provides that:

The [artisan's] lien provided for in this section shall attach regardless of whether or not the equipment, machine, machinery, motor, or motors, are ever upon the premises of or in the possession of the person making the repairs, furnishing the parts, or the supplies for such repairs.

42. "A mechanic's lien is a lien on land, and on the fixtures and improvements thereon, created by statute, to secure the compensation of persons who, under contract with the owner, or some person authorized in his behalf, contribute labor or material to the improvement of the land." H. TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY § 962 (C. Zollman ed. 1940).

43. U.C.C. § 9-313(1).

Article 9 interests in a state which treats such fixtures as personalty.<sup>44</sup> A mechanic's lien may also attach to the same goods.<sup>45</sup>

Originally the assumption was that Section 9-310 would govern the priority of mechanic's liens vis-à-vis consensual security interests. Professor Gilmore, one of the early drafters of the Code, wrote that Section 9-310 will "provide a uniform workable rule to determine relative priority in all cases as between artisan's, mechanic's and other similar liens and the holder of contractual security interests."<sup>46</sup> However, after Section 9-310 was reworded to include the troublesome phrase "goods in the possession of such person," commentators began to treat mechanic's liens as outside the scope of the section and governed by prior state law.<sup>47</sup>

The reason behind the exclusion is unclear. The Bankruptcy Act never invalidated statutory liens on real estate fixtures *per se*, so the justification advanced for excluding nonpossessory liens on personalty is not applicable here.<sup>48</sup> Nor does inadequate notice pose as significant a problem as it does with personalty. To perfect a mechanic's lien in Pennsylvania, for example, a claim must be filed within four months of the completion of work and written notice served on owners within one month after filing.<sup>49</sup> The place of filing is the county in which the fixture is located.<sup>50</sup> Although the problem of a notice-date preceding actual filing still exists, by periodically examining the collateral and the land records of this one county creditors can keep themselves at least ultimately informed. They are never misled by the fact that a mechanic does not have possession of goods subject to his lien, since it is seldom feasible to give a mechanic possession of goods physically attached to the debtor's realty. They are alerted by Section 9-313 to the potential relevance of real property interests and of the need to check the land records for rival claims.

If, on a constructive possession theory, Section 9-310 is held to in-

44. *Id.*

45. Under Connecticut law, for example, a heating furnace is subject to a mechanic's lien unless otherwise specified by the parties. *Hartlin v. Cody*, 144 Conn. 499, 134 A.2d 245, (1957). Section 9-313(1) assures the continued validity of a security interest in the furnace as well.

46. G. GILMORE, 4 CONFERENCE ON PERSONAL FINANCE LAW QUARTERLY REPORT 13 (No. 3, 1950).

47. 1 P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 5.07(1)[b] (1966).

48. 11 U.S.C. § 107(b), (c), *as amended*, 11 U.S.C.A. § 107(b), (c) (Supp. 1965).

49. PA. STAT. ANN. tit. 49, § 1502 (1965). In addition a subcontractor must give the owner actual notice thirty days before filing every claim, and if the claim is for alteration and repairs he must further have given preliminary notice to the owner of intent to file a claim on or before the date of completion of work. PA. STAT. ANN. tit. 49, § 1501 (1965).

50. PA. STAT. ANN. tit. 49, § 1502(b) (1965).

clude mechanic's liens and to accord them priority over Article 9 interests, a circular priority could result whenever Section 9-313 prefers an Article 9 interest over a real interest. Commonly a state will prefer real property interests over a mechanic's lien.<sup>51</sup> If it does, then the real property interest is superior to the mechanic's lien, which is superior to the Article 9 interest, which is superior to the real property interest. The existence of such an obvious circularity may evidence the Code's intention not to include a mechanic's lien as a Section 9-310 "possessory" interest.

Section 9-313, which controls priorities between Article 9 interests and "the claims of all persons who have an interest in the real estate," may also regulate mechanics' liens.<sup>52</sup> Under this provision, circular priority is still possible. A perfected post-affixation security interest would take preference over a subsequent mechanic's lien but not over a prior judgment lien on the realty.<sup>53</sup> In New York, on the other hand, the mechanic's lien would have preference over any prior judgment lien which did not represent a claim for money spent on improvements.<sup>54</sup> Circularity may result, for the mechanic's lien may be superior to the judgment lien, which is superior to the security interest, which is superior to the mechanic's lien.

Circular priorities cannot be resolved by any general reliance on the commercial policy implicit in Sections 9-310 and 9-313 that interests enhancing the value of the security should be protected even at the expense of prior interests, for more than one of the competing interests will invariably have contributed to the value of the collateral.<sup>55</sup> *Coble-skill Savings & Loan Association v. Rickard*<sup>56</sup> applied an assumption-of-risk rationale to break the chain of circularity among a mechanic's lien,

51. In Connecticut, for example, the lien is given subordinate to other encumbrances originating before the commencement of such services or furnishing of such materials. CONN. GEN. STAT. ANN. tit. 49, § 33 (1958). The mechanic's lien is not defeated by other encumbrances filed while work is in progress, nor by a prior real estate mortgage, whether a purchase money mortgage or not, filed after work has begun. *Gruss v. Miskinis*, 130 Conn. 367, 34 A.2d 600 (1943). Pennsylvania law is similar. PA. STAT. ANN. tit. 49, § 1508 (1965). *Citizens Bank of Palmerton v. Lesko*, 277 Pa. 174, 120 A. 808 (1923). See also 57 C.J.S. *Mechanic's Liens* § 200 (1948).

52. U.C.C. § 9-313(2)-(5). Since Section 9-313 contains no exception for contrary state priority law, the Section would clearly effect a more far-reaching modification of state law than Section 9-310. Moreover, the modification would reverse the priority established under Section 9-310. For a mechanic's lien would be subordinated to all Article 9 interests except those perfected by the Article 9 security holder after the goods had become affixed to the realty and a mechanic's lien had arisen.

53. U.C.C. § 9-313(3): "A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods . . ."

54. N.Y. LIEN LAW § 13 (McKinney 1966).

55. See p. 1651 *supra*.

56. 15 App. Div. 2d 286, 223 N.Y.S.2d 246 (1962).

a real property mortgage (securing a building loan) and judgment liens. The court ruled that the mortgage lender knew or should have known of the danger that circularity might develop, and subordinated his claim to the claims of the mechanic's lienor and the judgment creditors.<sup>57</sup> If it is commercially reasonable to presume that mortgagees before extending a loan will examine land records and realize that circularity is possible, whereas mechanics will not do so before furnishing services or materials,<sup>58</sup> the *Cobleskill* solution is about as good as any that could be devised.

Courts could, however, reject an all-or-nothing approach and apportion collateral pro rata among liens in cases of circular priority. Adopted by the Code in the case of accessions<sup>59</sup> and commingled assets,<sup>60</sup> the principle of apportionment has both a familiar and strong appeal to equity.

*"Unless the lien is statutory and the statute expressly provides otherwise"*

An artisan has priority under Section 9-310 "unless his lien is statutory and the statute expressly provides otherwise."<sup>61</sup> It is not immedi-

57. "Appellant knew or should have known that these judgments would have priority over its claim in a foreclosure proceeding, and since the money advanced was for building purposes it should also have been aware of the possibility that a mechanic's lien could be filed. . . . Appellant should have envisioned the instant problem and in fact could have eliminated it, and at the same time protected the mechanic's lienor, by compelling the Rikards to satisfy the prior judgments before it made the loan to them." *Id.* at 288, 223 N.Y.S.2d at 248.

58. The size of the original loan was \$8,000 while the size of the mechanic's lien held entitled to priority was only \$944.88. In such circumstances it is reasonable to expect a higher degree of care from the commercial lender than from the contractor. Furthermore, when a loan is made by a commercial lender he reviews as a matter of course the state of the security offered. A building contractor who agrees to do work on a property contemplates payment upon completion of work and does not necessarily contemplate at that time the possible need of a lien to insure payment. He is thus less likely to check the owner's security before agreeing to do work for him.

59. Section 9-314.

60. Section 9-315.

61. The contrary state law can be other provisions of the Code itself. Section 7-209(3) provides, *inter alia*, that a warehouseman's lien for charges and expenses is effective against others than the bailor when such other person "so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid." This provision is similar to Section 28 of the Uniform Warehouse Receipts Act, which provision was regularly interpreted to mean that the warehouseman's lien was not good as against a prior perfected security interest. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 33.6 (1965).

The Code's treatment of carrier's liens in Section 7-307 may also produce different results than under Section 9-310, for unlike Section 9-310 the provision in Article 7 states specifically who may subject goods to the lien. A carrier required by law to carry the goods receives priority unless he has notice that the consignor lacked all authority. If the carrier is obligated only by contract his lien has priority only so long as the consignor was actually permitted to have possession of the goods. Unlike the law in the first in-

ately apparent why the Code insists that not only the order of priority, but also the lien itself, be established by statute. Gilmore suggests that the drafters included this whole exception for contrary statutory law to avoid the confusion which would have resulted if all prior statutes regulating priorities had been repealed by implication.<sup>62</sup> The exception was felt appropriate only where a state had consciously adopted a priority system different from that employed under Section 9-310. But an explicit decision of the state legislature to subordinate an artisan's lien would be adequately indicated by a statute specifically establishing the subordinate priority whether the lien itself was a creature of common or statute law.

The requirement that a lien be created as well as subordinated by statute would thus seem superfluous; it can only frustrate the unwary legislature. In Ohio, for example, on the same day the Code was enacted the legislature subordinated all automobile liens to certain prior recorded interests.<sup>63</sup> Yet this clear expression of legislative intention was not sufficient to overcome Section 9-310's grant of priority for an artisan's lien, because the lien was created by common law. Only by construing automobile interests as being outside of Article 9 regulation was an Ohio court able to uphold the legislative intention.<sup>64</sup> This con-

stance, no lien arises if the consignor is a thief. As in the case of warehousemen's liens, therefore, Section 9-310 may not be the provision in the Code that is controlling.

It should also be noted that even if a contrary state lien statute expressly provides for preference of the prior security interest, subordination of the subsequent artisan's lien is not inevitable. State law may still provide for subordination of the prior secured claim through waiver. There is no reason to think that Section 9-310 invalidates such waivers. Section 9-316 specifically establishes the rights of creditors to subordinate their rights. A recent Alaska case held that the prior security holder had not waived his rights, but by implication the court suggested that even in a Code state with express statutes subordinating the artisan's lien, waiver of the prior rights is still possible. However, the waiver could not be by implication. *Decker v. Aurora Motors, Inc.*, 409 P.2d 603 (Alaska 1966).

62. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 33.5 (1965).

63. OHIO REV. CODE ANN. ch. 4505.13 (1965): "Any security agreement covering a security interest in a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's or importer's certificate . . . shall be valid as against . . . subsequent purchasers, secured parties, and other lien holders or claimants."

See also 2 U.C.C. REP. SERV. 750 (1966).

64. *Commonwealth Loan Co. v. Berry*, 2 Ohio St. 2d 169, 31 Ohio Op. 2d 321, 207 N.E.2d 545 (1965). The opinion relies in part on the fact that the Ohio legislature exercised, with respect to cars, the option given a state under Section 9-302(c)(2) to establish a different control filing system than that provided by the Code. The court implies that by so doing the legislature excluded security interests in cars from the control of Article 9 and therefore of Section 9-310. Section 9-302 is not meant, however, to encourage indirect amendment of the priority scheme established by the Code. While the legislature may well have intended the result reached in this case, courts should insist that before they will give such wide scope to the legislative enactment the Code must be altered to state specifically any intended amendment. See *Westlake Fin. Co. v. Spearmon*, 64 Ill. App. 2d 342, 346, 213 N.E.2d 80, 82-83 (1965).

In a lower Ohio court the problem in the case was resolved by what seems a clear misreading of the Section. The court interpreted the requirement that "the lien be statutory" to go to the nature of the voluntary security interest rather than to the non-

## Nonconsensual Liens

struction may not be possible in other states. But if confronted with a statute which expressly subordinates a common law artisan's lien, a court could always hold that the statute "ratifies" the lien, so that the lien is statutory within the meaning of Section 9-310.

Another problem lurks in the clause "unless the lien is statutory and the statute expressly provides otherwise."<sup>65</sup> When read literally, these words seem to permit only the statute which creates a lien to subordinate it. But it is often fortuitous that a statute which establishes a lien also continues to regulate its priority.<sup>66</sup> Legislatures frequently repeal scattered individual priority statutes for existing liens, and enact a comprehensive priority provision for all. Similarly a legislature may modify existing priorities by a provision in a statute creating a new lien. No substantive decision is thus implied by the fact that a priority provision appears elsewhere than in the statute creating the lien. This meaningless fact should not be determinative of whether Section 9-310's "unless" clause applies. The Code need not be interpreted so narrowly.<sup>67</sup>

## Judicial Liens

Under the Code, a judicial lien acquired by a creditor who has knowledge of a prior security interest in the same property is subordinate to that interest. A judicial lien acquired by a creditor without such knowledge has priority over a security interest which is perfected *after*

voluntary lien. *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*, 4 Ohio App. 2d 24, 33 Ohio Op. 2d 6, 211 N.E.2d 57 (1964). This would reduce the whole exception in Section 9-310 to an exercise in futility in most cases since the statute governing such security interests is Article 9, including, of course, Section 9-310. The court avoids this, however, by citing as the relevant statute section 4505.13, the Ohio motor vehicle statute. On appeal the supreme court at least brought some order to the problem by first expressly stating that "[T]he lien referred to in Section 1309.29, Revised Code, is the artisan's lien." *Commonwealth Loan Co. v. Berry*, 2 Ohio St. 2d 169, 170, 31 Ohio Op. 2d 321, 207 N.E.2d 545, 546 (1965).

65. Emphasis added.

66. In Massachusetts, for example, a garage keeper is given by statute a lien for the storage and care of automobiles. MASS. ANN. LAWS ch. 255, § 25 (1956). Also by statute liens of all bailees are specifically subordinated to a prior conditional vendor or lessor if the artisan receives the goods subsequent to the breach of any condition of the security agreement and the secured creditor claims his property from the artisan within 90 days. MASS. ANN. LAWS ch. 255, § 35 (1956). While the two provisions are codified under the same chapter entitled "Miscellaneous Liens," they were passed at different times as parts of different bills and have not subsequently been combined into one statute by legislative action.

The provision's reference to conditional vendors or lessors will only raise additional problems since the Code now recognizes only security interests. *See* note 36 *supra*.

67. An Ohio court briefly raised the problem but the question was unrelated to the case and no solution was suggested. *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*, 4 Ohio App. 2d 24, 33 Ohio Op. 2d 6, 211 N.E.2d 57 (1964).

the lien attaches,<sup>68</sup> but is subordinate to a security interest which perfects *before*.<sup>69</sup>

### *Time of Perfection for the Security Interest*

While this priority scheme often makes the time of perfection critical, the time of perfection is not always easily ascertainable under the Code. For example, a secured creditor cannot perfect his interest before he gives value<sup>70</sup> and he does not give value by merely promising to make voluntary, optional future advances.<sup>71</sup> A secured creditor who agrees to make voluntary future advances has thus only an incomplete interest until he makes the first advance. The Code is unclear as to whether the giving of value under the first advance is sufficient to perfect every voluntary advance made under the agreement or just the initial one.<sup>72</sup> If only the initial advance is perfected, then a judicial lien attaching after that advance would have priority over every advance subsequent to the lien.<sup>73</sup> If all advances are perfected from the time of the first, then the judicial lien has preference over none.

68. A lien creditor is a creditor who has acquired his interest by attachment, levy or the like. Section 9-301 provides that an "unperfected security interest is subordinate to the rights of . . . (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." By implication, a lien creditor who has knowledge of a prior unperfected security interest is subordinate to it.

Section 9-313 also provides that a security interest, whether attaching before or after the collateral has become affixed to real property, is subordinate to a judgment lien acquired before the security interest is perfected if the lien is obtained without knowledge of the secured party's rights. If a security interest attaches after goods become a fixture, the interest is in addition subordinated to any existing judgment lien on the real estate.

69. Since the drafters of the Code regulated priorities between unperfected security interests and judgment liens, reason suggests they would also regulate priorities between perfected interests and judgment liens. Further, if the provisions subordinating Article 9 interests to such lien creditors only refer to unperfected interests, then the clear intent, if not the assumption of the drafters, was that perfected security interests would not be subordinated to subsequent judgment liens. Nowhere does the Code specifically so state, however. At best it can only be said to be implied.

70. U.C.C. § 9-204: "A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

U.C.C. § 9-303: "A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken."

71. Section 1-201(44)(a) states that "a binding commitment to extend credit" constitutes value, thereby suggesting that a commitment does not constitute value if not binding.

72. 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 35.6, at 934 (1965); Coogan & Gordon, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 HARV. L. REV. 1529, 1551-66 (1963); Coogan, *Intangibles as Collateral Under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 1028 (1964); see also Coogan, *Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 867 (1959) (conflicting security interests).

73. Provided the judicial lienor had no knowledge of the security agreement.



## Nonconsensual Liens

Under the common law each advance was deemed a separate security interest when actually made.<sup>74</sup> There is, perhaps, rough justice in so favoring a judgment creditor over one who makes voluntary advances. A judgment creditor attaches property presumably because it is the only way to assure satisfaction of an outstanding debt. Such a creditor is almost inevitably damaged if his levy is upset by another creditor making subsequent advances. In contrast, the prior security interest holder can avoid any damage to his interests by simply ceasing to make further advances upon notice of the judgment lien. This consideration in most cases should outweigh any argument the secured creditor can make that his advances added to the value of the estate and that he is therefore entitled to priority.<sup>75</sup>

In some states reliance on this common law solution would contradict a clear legislative policy. In Pennsylvania, for example, the pre-Code chattel mortgage statute provided specifically that voluntary future advances "shall be secured to the same extent and shall have the same priority as if made at the time of the execution of the mortgage."<sup>76</sup> The statute reflects the view that it is often unclear whether a future advance is mandatory or voluntary, and that creditors should not be compelled to choose between making an advance which might be subordinated to a judicial lien, or not making an advance which might be legally mandatory. Secured creditors are thus spared a painful judicial risk, and future-advances financing is encouraged. In states like Pennsylvania the Code should probably be interpreted in the light of the legislation which preceded it rather than the common law. But such an interpretive technique has its disadvantages.

### *Time of Attachment for Judicial Liens*

The time a judicial lien attaches is usually made clear by state law; the lien can date from as early as the initiation of suit.<sup>77</sup> The danger to the secured creditor lies therefore not in his inability to ascertain when judicial liens attach, but in the fact that such liens may attach before it is legally possible for him to perfect his security interest.

74. *Farmers Nat'l Bank of Pennsburg v. Kern*, 194 Pa. Super. 479, 168 A.2d 620 (1961); *McLane v. Roman*, 52 Pa. 458 (1866).

75. Even if no value is considered to have been given, the voluntary future advances agreement can still qualify as an unperfected security interest. The rights of a creditor who obtains a judicial lien with knowledge of that interest are subordinate to the security agreement.

76. No. 434, § 4, [1945] Pa. P.L. 1358 (repealed 1953).

77. *Peoples Savings Bank v. Corrado*, 151 Conn. 388, 390, 198 A.2d 209, 210 (1964); *Joseph v. Donovan*, 116 Conn. 160, 164, 164 A. 498, 499 (1933).

Consider a security agreement which provides that goods in which the debtor subsequently attains rights shall be subject to the creditor's mortgage.<sup>78</sup> On occasion, a judgment creditor can garnish<sup>79</sup> or attach personalty<sup>80</sup> before the debtor has rights in it recognized by the Code;<sup>81</sup> if the debtor has no rights in the property, his secured creditor can have none under an after-acquired property clause.<sup>82</sup> In Pennsylvania, for example, when two or more execution writs of separate plaintiffs are levied on a garnishee, priority is determined by the date of service of the original writ as to all property then in the hands of the garnishee or coming into his possession up to the time of judgment against the gar-

78. Sometimes the secured creditor's inadvertence permits the judicial lienor to obtain priority. If, for instance, by the terms of the agreement the security holder has an interest in only the after-acquired accounts of the debtor, such an interest could not perfect until the debtor's executory contracts had ripened into a present right to payment. U.C.C. § 9-106. A judgment creditor, on the other hand, may sometimes garnish or attach these contract rights earlier, when the debtor's rights are still only executory. P. Coogan, *Intangibles as Collateral under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 1014 (1966).

79. In Connecticut a creditor may garnish any debt, legacy or distributive share that is or may become due to such defendant from the estate of a deceased person or insolvent debtor by garnishing the executor, administrator or trustee of such estate. CONN. GEN. STAT. ANN. tit. 52, § 381 (1958). Depending on when a court determines such interests become definite enough to be termed the debtor's property, thereby allowing the security interest also to attach, it is possible that the judgment creditor may be able to establish a lien prior in time to that of the Article 9 interests. Section 9-204, for instance, is silent as to how contingent an inheritance right may be and still be termed the debtor's property.

80. In Pennsylvania the right to attach a debtor's property before final judgment is limited. If the defendant is a nonresident with property in the hands of others within the state, the plaintiff may garnish such property within the state at the initiation of the suit. PA. STAT. ANN. tit. 12, R. 1252 (R. Civ. Proc. (1966 Supp.)). Attachment upon initiation of suit may also be obtained under the Fraudulent Debtor's Attachment Act when the debtor threatens to hide or otherwise protect his personal property from subsequent seizure by plaintiff pursuant to an execution writ following judgment. PA. STAT. ANN. tit. 12, R. 1286 (R. Civ. Proc. (1966 Supp.)). Both Rules are rather narrowly interpreted to limit their availability, e.g., *Greenwald v. Marvin*, 31 Pa. D. & C.2d 748, 752 (1963), (R. 1252 interpreted narrowly).

In aid of execution of judgment, tangible personal property in the hands of a third party and intangible personal property and rents of the judgment debtor can be levied on by executing a writ on the garnishee. PA. STAT. ANN. tit. 12, R. 3108 (R. Civ. Proc. (1966 Supp.)). Attachment when authorized is treated similarly to garnishment under a writ of execution, except that at the time of attachment the party garnished must possess some property of the debtor's. This is not required before a writ of execution may be served. Once the garnishment is valid, the lien is good against all personal property which may come into his possession until judgment is entered against him. See PA. STAT. ANN. tit. 12, R. 3111(b) (R. Civ. Proc. (1966 Supp.)). Compare *Sniderman v. Nerone*, 136 Pa. Super. 381, 384, 7 A.2d 496, 498 (1939), *aff'd*, 336 Pa. 305, 9 A.2d 335 (1939); *Pennsylvania Co. v. Youngerman*, 314 Pa. 277, 282, 171 A. 594, 596 (1934); *Frazier v. Berg*, 306 Pa. 317, 325 (1932).

81. The Code seems never to have contemplated the fact that a debtor might have no "rights in the collateral" insofar as a judgment lienor is involved, but not insofar as a secured creditor is concerned. U.C.C. § 9-204, Comments 1 & 2; § 9-301, Comments 1-3. But the un contemplated is a distinct possibility. See notes 72-73 and p. 1664 *supra*.

82. U.C.C. § 9-204: "1) A security interest cannot attach until . . . the debtor has rights in the collateral . . ."

nishee.<sup>83</sup> The date of the original service might be found equally operative when the judgment creditor competes with an Article 9 security interest. If so, then the judgment creditor would always have priority with respect to property the garnishee acquires subsequent to the service of process.

This interpretation of Pennsylvania law is not inevitable. Special laws applicable to intramural conflicts between two liens of the same type may not be controlling for liens that are governed by different statutes which allow one lien to be created before the other. Preference in such cases might be based on the more general rule that until the debtor acquires an interest in property creditors can acquire none.

If a Pennsylvania court should adopt the more general rule as to when a judicial lien attaches, then a judgment lien could be considered to attach at the same moment an Article 9 security interest is perfected. A court faced with simultaneous attachment and perfection could follow Pennsylvania common law that provides for a pro rata distribution of the collateral.<sup>84</sup> Since the possibility of such simultaneous attachment results from Article 9 security holders encountering interests outside the scope of the Code, there would be no reason for the Pennsylvania court not to go outside the Code for the solution to the problem as well. While this would be a novel approach, it would avoid an all-or-nothing solution when it is difficult to think of a persuasive reason to award the whole collateral to one creditor alone.<sup>85</sup> It would also comport with the principle of apportionment, which the Code approves with respect to accessions and commingled assets.

Yet another alternative, suggested in *Rosenberg v. Rudnick*,<sup>86</sup> would be to award preference to a security interest if filed before service of the writ of execution; if filed subsequent to the writ the lien would be subordinate. This priority scheme would parallel that established by the

83. PA. STAT. ANN. tit. 12, R. 3137(b) (R. Civ. Proc. (1966 Supp.)); *Sniderman v. Nerone*, 136 Pa. Super. 381, 7 A.2d 496 (1939).

84. *Claason's Appeal*, 22 Pa. 359 (1853); *Hendrickson's Appeal*, 24 Pa. 363 (1855).

85. We must first face the fact that priority rules under most systems of law are complex, and, to a considerable extent, arbitrary. Perhaps a better word is "technical." One cannot assume that a rule governing a large body of commercial practices will always favor the "good" man even where it is possible to determine who the good man is. Although the application of a priority rule in a particular situation usually has a basis in common sense, the priority rules of the Code are in many ways as arbitrary as the rule in a bridge game that says that an ace takes priority over a king.

Coogan & Gordon, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 HARV. L. REV. 1529, 1563 (1963).

86. 262 F. Supp. 635 (D. Mass. 1967). The court reasons that while an after-acquired property mortgage is not fully perfected until the debtor acquires rights in the collateral, it can be partially perfected immediately upon filing. When filed, the mortgage is perfected against judicial lienors, but not buyers in the ordinary course of business and purchase money security interests. *Id.* at 638.

Code for two after-acquired property mortgages where both have been filed.<sup>87</sup> But while this priority rule allows two after-acquired property interests to compete on equal terms, it would, if extended to the context of a secured creditor competing with a judgment lienor, favor the after-acquired property creditor over the judicial lienor. The former could file his lien at any time after he agreed to extend credit, whereas the latter could obtain one lien only after the debtor had defaulted.

But if a court must adopt a priority scheme that will on rare occasions handicap one creditor and favor another, perhaps it is the secured creditor who should be prejudiced. If he finds himself disadvantaged, he can always reduce his claim to judgment and obtain a judicial lien<sup>88</sup>—the lien creditor has no converse option.

87. U.C.C. § 9-312(5).

88. Section 9-501(1): "When a debtor is in default under a security agreement, a secured party . . . may reduce his claim to judgment or otherwise enforce the security interest by any available judicial procedure."